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Nos. 78-119 and 78-139

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

ON PETITIONS FOR WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INDIAN TRIBES

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT INDIAN TRIBES

The tribes submit a single response to the Petition of the State of Washington (Pet. 78-118) and the Petition of the Puget Sound Gillnetters (Pet. 78-139) both of which seek review of certain enforcement orders affirmed by the Ninth Circuit Court of Appeals in the Washington fisheries dispute as well as certain aspects of the original *United States v. Washington* judgment. The Petitions also seek review of a separate appeal in *United States v. Washington*.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, concerning the enforcement orders is entitled *Puget Sound Gillnetters Ass'n v. District Court* and is reported at 573 F.2d 1123 (1978). The original decision in *United States v. Washington* is reported at 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *rehearing denied*, 424 U.S. 978 (1976). The subsequent opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Washington* is reported at 573 F.2d 1118 (1978).

II.

QUESTIONS PRESENTED[1]

1. Whether the District Court abused its discretion, in implementing prior orders protecting federally reserved treaty fishing rights against massive incursions by state and private interests, by allocating salmon fishing opportunities among treaty and non-treaty fishermen for the 1977 Puget Sound salmon season.

2. Whether the claim that the allocation order so entered offends equal protection, has been resolved by prior litigation or is otherwise meritorious.

3. Whether nonparties engaged in widespread, admitted, and deliberate attempts to frustrate prior orders protecting federally reserved fishing rights may be included within the scope of enforcement orders.

1. Question Number 4 as set forth in the United States Memorandum was not raised by the Petitions and the United States has not raised it by cross-petition; it is therefore not properly before this Court.

4. Whether the Ninth Circuit erred in dismissing as moot appeals from certain 1975 actions of the District Court involving sockeye salmon fisheries.

III.

STATEMENT OF THE CASE

A. Introduction

The Petition for Review by the State of Washington represents yet another effort to overturn or circumvent implementation of several federal Indian treaties. Several non-treaty fishermen's associations, whose members have been represented by the State as *parens patriae* in the proceedings below, have joined in that effort. These petitions collaterally attack *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), where it was adjudicated that the treaties reserved to Western Washington Indian tribes certain fishing rights. The dispute concerning the meaning of the treaties and the scope of the restrictions they impose on State authority has been before this Court on a number of occasions.[2] Those decisions have determined the parameters of State authority. The issues presented by the instant case are not novel nor do the circumstances surrounding it justify Supreme Court review.

First and foremost, the Supreme Court has already denied review of *United States v. Washington*. 423 U.S. 1086

2. *See United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (Puyallup I); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (Puyallup II); *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (Puyallup III). *See also, Antoine v. Washington*, 424 U.S. 194 (1975) construing similar language in a non-treaty context.

(1976). At that time, of course, the *United States v. Washington* declaratory judgment became final, including the District Court's interpretation of the treaties which the Petitioners seek to re-open here. The latest series of enforcement orders entered by the District Court and affirmed by the Ninth Circuit Court of Appeals, *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1123 (1978), have become necessary only because of the refusal of the State of Washington and certain non-treaty fishermen to comply with the original decision. No new circumstances are presented which would call for an avoidance of ordinary principles of *res judicata*.

Petitioners, in attempting to justify review, rely heavily on an asserted conflict between *United States v. Washington* and the decisions of the Washington State Supreme Court. However, no direct or justiciable conflict exists. The State Supreme Court cases were collusive lawsuits in which the only parties were the State of Washington and the non-treaty fishermen's associations, who, as the Petitions reveal, have an identical interest and desire the same result. Moreover, the District Court has avoided direct conflict with the State court system by removing State control over Indian treaty fishing except as necessary for conservation purposes. Since the State's jurisdiction is now primarily limited to the non-treaty fishermen and to the portion of the harvest allocated to them, the State Supreme Court's interpretation of the treaties has become irrelevant.

Finally, it should be emphasized that far from the state of chaos portrayed in the petitions, the District Court's 1977 orders have brought a large measure of stability to the fishery. In the 1977 season, the tribes harvested close to their treaty share for the first time. Direct confrontation

with the State courts was avoided and a number of contempt citations have been successfully prosecuted against non-treaty fishermen who were violating the Court's orders. A series of such convictions were recently affirmed by the Ninth Circuit Court of Appeals. *See United States v. Olander, et al.*, Nos. 77-3794, 77-3925, 78-1239, 78-1240, 78-1310, 78-1311, 78-1312 (September 7, 1978) (A copy of the decision has been lodged with the Court.) It is to be expected that enforcement for the 1978 season will be even more effective because of the experience gained last season by the federal agencies and because of the deterrent effect of the affirmed convictions.[3]

The United States acquiesces in review although with obvious and well-placed misgiving. The United States' recommendation was made in the twin hopes that a ruling from this Court will enable the State to assume its responsibility to manage the fishery consistent with the Indian treaty fishing rights,[4] and that the fishing rights controversy may be finally resolved.[5] In light of the State's history of recalcitrance with respect to treaty fishing rights, however, these hopes are unlikely to be realized.

Moreover, in attempting to justify Supreme Court review in circumstances where no meritorious issues are presented, the United States has exaggerated both the extent of the District Court's involvement in actual man-

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3. The attorneys for the non-treaty fishermen have argued that the District Court did not have authority to enjoin non-parties and that they were bound by the Court's interpretation of the treaties. Those arguments were repeated in the press and widely circulated, and many fishermen doubtless believed that they would defy the District Court without fear of penalty. The Court of Appeals specifically rejected those arguments.

4. U.S. Memo at 21.

5. *Id.* at 25.

agement of the fishery and the extent to which the State has relinquished such functions. Similarly, the scope of the enforcement problems involved in implementing the decision are magnified by the United States, especially in light of the recent Court of Appeals affirmance of the convictions discussed above. These overstatements undermine the heart of the United States' stated rationale for review. On the other hand, the tribes, while believing review inappropriate, join fully in the United States' discussion of the merits. Some additional comments are needed, however, to give proper perspective to that discussion.

B. Background Of This Litigation

In 1855 and 1856, the United States sent representatives to negotiate treaties with the Indian tribes in order to extinguish Indian title to the region as it had previously done with Spain, Russia and Great Britain. The tribes agreed to bargain and sell their land to the United States, except for small residential reservations. However, they insisted, and the United States agreed, that they would retain their right to fish in their customary locations on and off reservation. Such off-reservation fisheries would be shared "in-common" with the non-treaty inhabitants of the territory. These fishing rights were not "granted to the Indians,"[6] but were *reserved* by them. *United States v. Winans,* 198 U.S. 371, 381 (1905).

Contrary to the State's implication,[7] at the time of the

6. Petition for Writ of Certiorari in *Puget Sound Gillnetters Assoc. et al. v. United States District Court for the Western District of Washington,* Cause No. 78-139 (hereafter cited as "Gillnetters' Pet. Cert.") at 8.

7. ". . . the Indian fishery being primarily for subsistence." Petition for Writ of Certiorari in *State of Washington, et al. v. United States of America, et al.,* Cause No. 78-119; (hereafter cited as "State Pet. Cert.") at 8.

treaties, Indians were trading in fish in substantial volume and supplied most of the fish and shellfish used by the non-Indian settlers. 384 F. Supp. at 343, n. 29, 350-353. The treaty negotiators for the government were aware of Indian commerce in fish and of its contribution to the territorial economy. Treaty Indian commercial fishing is not a new development and the evidence shows clearly that the treaties were not intended to preserve only subsistence fishing. However, the admission of Washington to the Union some forty years later, coupled with the influx of European settlers and the introduction of the canning industry, created a governmental mechanism, the political power, and an economic incentive for the growing non-Indian majority to exclude the Indian tribes from their dominant position in the commercial salmon fishery.

The State's implication[8] that Indian fishermen, prior to the District Court's 1974 decision were afforded equal access to the fishery is false. Indian usual and accustomed fishing grounds are located primarily in terminal areas at the end of the salmon migration routes. After this Court held that the State could not deny Indians access to their usual and accustomed places, *United States v. Winans,* 198 U.S. 371 (1905), the State allowed the exercise of treaty rights to be circumvented by authorizing and encouraging non-treaty harvest of the fish runs before they reached these traditional fishing places. The State justified the taking of the entire harvestable surplus of a fish run in the marine waters prior to the run reaching the usual and accustomed fishing places of most tribes, by arguing that Indian fishing could lawfully be restricted in the name of conservation to assure an adequate escapement of mature

8. State Pet. Cert. at 13.

salmon to reproduce and perpetuate the runs.[9] *United States v. Washington,* Findings of Fact 217-218, 384 F. Supp. at 393.

Eight years ago, faced with a continuing pattern of discrimination against Indian fishermen which even a series of Supreme Court decisions protecting treaty rights in Washington did not deter,[10] the United States and a number of Northwest Indian tribes filed an action against the State of Washington in the Western District of Washington seeking declaratory and injunctive relief. Following several years of pre-trial development of evidence and a lengthy trial, the District Court determined that the State had systematically discriminated against treaty fishermen by practices such as capricious closures, arrests, gear seizures, and physical violence, and restrained the State from interfering further with these federally-guaranteed rights. 384 F. Supp. 312, 399-405, 413-19 (1974). The District Court's rulings, which dealt comprehensively with the issues of tribal self-regulation, allocation of fishing opportunity among treaty and non-treaty fishermen, and the power of the State to restrict off-reservation fishing for conservation purposes, were affirmed in all material respects by the Ninth Circuit. 520 F.2d 676 (1975). Certiorari was denied by this Court on January 26, 1976 upon the recommendation of the United States. 423 U.S. 1086.

Subsequent to the 1974 decision, substantial efforts at implementation of the District Court's orders have been

9. It is to this practice that the Gillnetters allude when they state:
> It was the State of Washington's efforts to conserve the salmon that created the conflict between the State of Washington and the various treaty tribes over the Indians' entitlement to harvest salmon contrary to regulations adopted by the State.

Gillnetters' Pet. Cert. at 8.

10. *See* authorities cited in note 1, *supra.*

undertaken.[11] At the technical level these efforts have been particularly successful. Cooperation between the State and tribal governments[12] is perhaps most crucial in the biological decisions which comprise fisheries management. Fisheries biology is a specialized but inexact science and experts may disagree over such technically complex matters as whether a need for a conservation closure exists. Recognizing this, the District Court from the outset of the continuing jurisdiction phase of *United States v. Washington,* has utilized a Technical Advisor in fisheries biology and has established procedures to resolve technical disputes.

As part of the 1974 ruling, the District Court adopted an Interim Plan, 384 F. Supp. at 420, which requires state and tribal biologists to formulate general principles for fisheries management and to exchange biological data.[13] A refined procedure for resolving technical issues has been implemented through the creation of a Fisheries Advisory Board consisting of a representative of the State, of the affected tribes, and the non-voting Technical Advisor. When agreement is reached on a technical issue the text is reported to the District Court and the matter concluded. When agreement is impossible, the aggrieved party may

11. Congress has appropriated millions of dollars to implement the original decision, a sizeable portion of which has gone to the Bureau of Indian Affairs for the purpose of strengthening the tribes' fisheries management programs. *See e.g.,* House Comm. on Appropriations, Department of Interior and Related Agencies Appropriation Bill, 1976, H.R. Rep. No. 374, 94th Cong., 1st Sess. 32 (1975).

12. The Northwest tribes have established comprehensive programs regulating Indian treaty fishing and have established biological staffs to handle the technical aspects of regulation. These efforts have been sanctioned and encouraged by the District Court. *See* Memorandum Adopting Salmon Management Plan, State Pet. Cert. at A-61.

13. *See also* Order for Program to Implement Interim Plan, R. 718.

invoke the Court's continuing jurisdiction to seek redress, The Fisheries Advisory Board has successfully resolved many of the underlying technical disputes in the salmon, steelhead and herring fisheries.[14]

The District Court has also required the Fisheries Advisory Board to consider long-range solutions to persistent biological problems, and ordered the parties to submit plans for resolution of these matters. These efforts culminated in an agreed-upon Salmon Management Plan adopted by order of the Court, August 31, 1977,[15] which now governs 1978 harvests anticipated in the case area.[16] The Plan covers many of the details of fishery management including methods for agreeing on escapement goals, determining run size estimates, and making "equitable adjustments" when one party or the other is denied an opportunity to harvest its share.

In addition, through the Fisheries Advisory Board the parties succeeded in reaching agreement on most of the technical bases for both the 1977 and 1978 allocation orders. These include such matters as run size estimates, escapement goals, harvestable numbers of fish and projected interceptions of fish by sports fishermen.

Given the above, it is clearly an over-simplification to state that the District Court has taken over day-to-day salmon fishery management. It *is* true that the Court has

14. *See e.g.*, R. 778, 816, 928, and 950.

15. State Pet. Cert. at A-61.

16. Below, the State appealed, in part, from the August 31, 1978 Order, but was content to argue that the plan was part of "the system" objected to. Washington Brief Before the Ninth Circuit, 10-11. We doubt whether the Plan is challenged by the Questions Presented in the State's Petition (at 4-5), but the objection is frivolous for the reason that the State agreed to the Plan before the District Court. (R. 1216, 1232)

established *mechanisms* to settle technical disputes out of court and a procedure to judicially resolve those which cannot be settled. Technical issues are addressed by the court, however, only after they have been refined through the Fisheries Advisory Board process (and only if no agreement has been reached). This is entirely appropriate, of course, and this process has kept most technical disputes out of court. Most of the management decisions, therefore, are made by the State and tribal biologists or by the Fisheries Advisory Board.

It must also be emphasized that this process has not prevented the State from performing its usual management tasks. The State estimates run sizes, escapement goals, and harvestable numbers based on information from its biological personnel in the Departments of Fisheries and Game. It monitors the runs during the season and makes appropriate adjustments to its pre-season estimates. It monitors catches by treaty and non-treaty fishermen and retains authority to close fishing by treaty and non-treaty fishermen when necessary for conservation of the resource. What the Court *has* limited is the State's ability to authorize harvests and enforce regulations without regard to treaty rights. The State's technical fisheries management activities have not been limited.

C. Events Leading To This Appeal

Unfortunately, State cooperation at the technical level has not been mirrored in other areas. The State through its agencies and courts has consistently attempted to circumvent and frustrate the District Court's decision.

> Except for some desegregation cases, . . ., the district court has faced the most concerted official and private

> efforts to frustrate a decree of a federal court witnessed in this century.[17]

Puget Sound Gillnetters v. U. S. District Court, 573 F.2d 1123 (9th Cir. 1978) at 1126.

The State resistance is chronicled by the United States in its brief at 8-18. From the beginning, the State resisted court orders limiting non-treaty fishing, which were designed to prevent mass interceptions of fish by a more mobile, mechanized non-treaty fleet before they reached the terminal usual and accustomed fishing areas. 384 F. Supp. at 384-85. Beginning in 1974, a series of injunctive actions in the state courts initiated by affected user groups resulted in holdings that the Washington Department of Fisheries could only regulate for conservation purposes, could not allocate between treaty and non-treaty fishermen and, therefore, lacked power to implement the federal orders.[18] These rulings then were invoked by the State to justify non-compliance with the federal orders. In the fall of 1974, the District Court was forced to intervene to protect its original decision, upon the recognition that the decision was being undone by a series of state proceedings "hardly resembling contested cases" (R. 671). Consistent refusals to comply by State officials, and reactive federal

17. This recalcitrance was also noted by Judge Burns in his concurrence to the original Ninth Circuit affirmance of the decision:

> The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

520 F.2d at 693.

18. The actions, all filed in the Thurston County Superior Court, were denominated *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, No. 50370; *Washington Kelpers Ass'n v. Tollefson*, No. 50552; and *Puget Sound Gillnetters Ass'n v. Tollefson*, No. 50757.

orders to protect the Indian fisheries, ensued in 1975, 1976, and again in 1977.

Implementation was frustrated further by progressively severe illegal fishing by non-treaty fishermen, abetted by official tolerance policies.[19] In 1975, large numbers of non-treaty fishermen fished in violation of state closures and federal court orders.[20] In 1976, the "whole fleet" of purse seiners was observed fishing illegally,[21] and the Puget Sound Gillnetters Association publicly encouraged its members to fish in violation of state closures.[22] This lawlessness was beyond the State's ability to control[23] and endangered the resource, intimidated public officials, and made contempt of the federal court a mark of distinction.[24] During each of these years, widespread violations of the Court's orders by non-treaty fishermen frustrated the exercise of plaintiffs' rights and interfered with defendants' ability to comply.[25]

As the 1977 fishing season opened in Puget Sound, it was clear that protection of the federal treaty rights would not

19. *E.g.*, Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders, Wash. Pet. Cert. A-79, A-80 to -81.

20. Finding of Fact No. 2, Preliminary Injunction; 1975 Chum Fishing, October 27, 1975; R. 812.

21. Testimony Before the Special Master, Sept. 29, 1976, and to the Fishery Advisory Board on Oct. 11, 1976, as summarized in Tribal Report to Fishery Advisory Board, Nov. 11, 1976, R. 989.

22. Report of Richard Whitney Re: Fisheries Advisory Board, Oct. 11, 13, 1976, Dated Nov. 17, 1976, R. 1003, with attached letter of James M. Johnson, Assistant Attorney General, Oct. 19, 1976, R. 1004.

23. Request for Determination Re: 1976 Chum Run, filed Oct. 28, 1976, by James M. Johnson, Assistant Attorney General, R. 960.

24. See Hearing of Sept. 22, 1977, p. 23. (Testimony reporting the unloading of several tons of illegally caught fish in "a carnival atmosphere, laughing and joking").

25. *See* Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders, Wash. Pet. Cert. A-83.

be undertaken voluntarily by the State. In June and November, the Washington Supreme Court in two decisions[26] ruled that the Department of Fisheries lacked power to implement the federal orders by allocating the catch between treaty and non-treaty fishermen. In District Court, the Department reaffirmed its policy of non-compliance[27] and on August 28, 1977, nearly 200 non-treaty fishermen were observed fishing illegally in Puget Sound.[28]

The District Court, however, took control of the situation with firmness and restraint. On August 31, with the express consent of counsel for the State,[29] the District Court granted a motion for a Temporary Restraining Order enjoining non-treaty fishermen from taking salmon in violation of the Court's orders and directed federal and state officials to serve copies upon offending fishermen.[30] This was followed, after certain extensions, by the entry, on September 27, 1977, of a Preliminary Injunction Re: Enforcement of 1977 Fisheries,[31] the order which the Court of Appeals affirmed.

The injunction prohibits non-treaty fishermen from fishing in violation of court ordered closures, provides for

26. *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151, Petition for Cert. pending No. 77-983; *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373, Petition for Cert. pending, No. 77-983.

27. Testimony of Gordon Sandison, Director, Department of Fisheries, Aug. 8, 1977.

28. Hearing of Sept. 22, 1977, at 72.

29. The order recites that the State Assistant Attorney General had been advised by the Whatcom County Prosecutor that fishing citations would not be prosecuted and that the State was thus requesting the Court "to assume enforcement responsibility for the 1977 fishing season." (*See* Gillnetters' Pet. Cert., App. E.)

30. Gillnetters' Pet. Cert., App. E.

31. *Id.*, App. H.

service by mail upon all State-licensed fishermen, and directs the State to maintain a "hotline" service to inform callers of areas opened to non-treaty fishermen. It was entered, after a hearing, and with notice to the non-treaty fishing groups and their counsel, who chose not to appear or otherwise participate. Accompanying "Findings of Fact and Conclusions of Law" recite that "there have been widespread, open and intentional violations of the Court's orders (and of State regulations enacted to comply with those orders)" by non-treaty fishermen[32] that citations have not been issued by State authorities despite numerous violations,[33] that prosecutors have refused to prosecute,[34] and that the consequence was an interference with the Court's jurisdiction over the harvest opportunity secured to the tribes.[35]

On August 31, 1977, the District Court entered a Memorandum Adopting Salmon Management Plan,[36] not seriously contested here, and a Memorandum Order & Preliminary Injunction.[37] That order states that the Defendant State is unwilling or unable to manage the fishery in conformity with the Court's prior decrees,[38] points out that the State's regulations for the 1977 Puget Sound commercial harvest of several salmon species ignored entirely the earlier rulings,[39] and, on the basis of unanimous recommendations of technical advisors representing the parties, identifies the

32. State Pet. Cert., A-82.

33. *Id.*

34. *Id.*

35. *Id.* at A-83.

36. *Id.* at A-61.

37. *Id.* at A-35.

38. *Id.* at A-36.

39. *Id.* at A-41, 42.

harvestable numbers of fish available within the various management regions.[40] On the basis of uncontested evidence that the in-Sound treaty and non-treaty fisheries had the capability of catching the fish so identified, the order then specified the harvestable number of fish to be made available to the treaty and non-treaty groups.[41] Taking the State at its word that it could do nothing to protect the treaty fisheries, the District Court assumed the power to regulate the treaty share,[42] leaving to the State the only power it asserted—to regulate for purposes of conservation.[43]

Appeals from these various orders, and supplementary ones, were consolidated by the Ninth Circuit with mandamus actions brought by fishing organizations not party

40. *Id.* at A-42, 44.

41. *Id.* at A-44-54. Based on special circumstances existing in the 1977 season, the District Court departed from the allocation formula decreed in the original decision. The Court made it clear, however, that the 1977 Allocation Order was not intended to modify the original decision regarding treaty entitlement.

42. *Id.* at A-54-58.

43. It must be emphasized that each of the enforcement orders entered by the District Court in 1977, was carefully tailored to meet each new State incursion against enforcement. Thus, when the State Supreme Court first opined that State agencies are unable to allocate fish between treaty and non-treaty fishers, the District Court's August 31, 1977 Memorandum Order and Preliminary Injunction lifted the burden of allocation from the State but left other aspects of state jurisdiction unaffected.

When the State advised the Court that it was powerless to regulate non-treaty fishing to protect the treaty opportunity, the District Court entered its September 27, 1977 Preliminary Injunction Re: Enforcement (*id.*, at A-89), which provided for direct court enforcement against non-treaty fishers.

Finally, when Chief Justice Wright of the Washington Supreme Court issued an order requiring the State to open a non-treaty fishery whenever consistent with *state* law (R. 1180), the District Court enjoined the State from promulgating any regulations opening a non-treaty fishery without court permission but provided the State could *close* a fishery when reasonable and necessary for the conservation of the resource. (State Pet. Cert. at A-93) This enabled the Department of Fisheries to continue to carry

to the action. Echoing Judge Burns' prophetic observations made three years earlier,[44] the Ninth Circuit took note of the State's "extraordinary machinations" in resisting the decree, and its efforts to frustrate the court orders. (*Puget Sound Gillnetters Ass'n v. District Court*, 573 F.2d 1123 (9th Cir. 1978) at 1126. Viewing the "pertinent questions" as "not whether the court was right or wrong in 1974," but "whether the court's actions are reasonable now" (*Id.* at 1129), the Ninth Circuit upheld in all particulars the District Court's allocation and enforcement orders. All members of the panel accepted as binding the Court of Appeals 1975 affirmance of the initial decision, differing only over "restatements" of the rationale for the apportionment rule of the earlier decision. (*Id.* at 1129, 1130).

On the same day as the affirmance of the allocation and enforcement orders, a separate panel of the Ninth Circuit dismissed as moot certain 1975 actions of the District Court involving sockeye salmon fisheries. *United States v. Washington*, 573 F.2d 1118 (9th Cir. 1978); State Pet. Cert. A-29. This decision is challenged in the State's petition in No. 78-119.

In summary, the District Court orders as affirmed by the Court of Appeals have had an increasingly stabilizing effect on the fishery and a dampening effect on the efforts of the State and non-treaty fishermen to undermine the treaty fishery. Contempt citations for violating District

out its statutory mandate to conserve the resource and, at the same time, protected the treaty opportunity. It also avoided the direct confrontation with the State Supreme Court that would have occurred had the District Court directly enjoined the State Supreme Court as the United States urged. This restrained but practical approach has been characteristic of the District Court throughout this controversy.

44. *See* note 17, *supra*.

Court orders have been successfully prosecuted and affirmed. The enforcement system utilized by the Court, in other words, is working and can be expected to become more effective.

At the management level, the technical staffs of the State and the tribes have achieved a large measure of cooperation. The District Court has established a mechanism to resolve conflicts out of court and a procedure to judicially resolve those disputes that can't be settled. The State of Washington, contrary to the State's assertion in its Petition at 26, retains substantial authority and performs its usual technical management functions. The picture of chaos and overreaching by the District Court painted by the State and associations in their briefs is completely inaccurate. Given the fact that the District Court's enforcement orders have been made necessary by State resistance to the decision, the Court's orders have been restrained and effective.

There is nothing inherently unworkable about the Court's decision in *United States v. Washington* or in its implementation, a fact illuminated by the situation in Oregon. In Oregon, parallel litigation involving the treaty fishing rights of the Oregon tribes has occurred. *See Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969) and *United States v. Oregon*, 529 F.2d 570 (9th Cir. 1976). In vivid contrast, however, Oregon has complied with the decisions of the federal courts, acknowledged that it and its non-treaty fishermen are bound by the treaty interpretation, and entered into agreements designed to fully implement the federal court decisions.[45] Oregon joined the

45. *See* "Brief of the Respondent, Yakima Nation, in Opposition" in Cause No. 78-139, at 6-7.

United States and the tribes before the Court of Appeals in supporting the efforts of the District Court to enforce the decision. Oregon's example sets Washington's recalcitrance in proper perspective.

IV.

DISCUSSION

A. There Is No Reviewable Conflict Between The Federal And State Courts

This Court, pending receipt of these petitions, has deferred decision in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, No. 78-983, which seeks review of two cases decided by the Supreme Court of Washington in which the tribes and the United States participated only as *amici curiae*. The asserted "conflict" between the State Court decisions and the federal court orders does not justify review.

First, assuming, *arguendo*, a conflict in decisions, review of the State cases is precluded because they do not rise to the level of a constitutional "case" or "controversy" within the meaning of Article III of the Constitution. *See generally, Flast v. Cohen*, 392 U.S. 83, 94 *et seq.* (1968). To rise to that level, a controversy must be "actual" and not feigned or contrived. The supposed "controversy" presented by the State cases does not pass this test.

Both State cases are collusive actions brought by commercial fishing interests against the State of Washington for the sole purpose of defeating the federal treaty rights declared in the 1974 decision. As the Ninth Circuit Court of Appeals determined below, the State of Washington, as *parens patriae*, represented the interests of the non-treaty citizens in the federal litigation. Thus, not only are

the State and commercial fishermen in the State litigation not adverse, they are identified in legal interest.

The proceedings before the Washington State Supreme Court were farcical.[46] Both cases were tried upon contrived records which had been agreed upon in advance by the parties. In the briefs and arguments before the Court, the non-treaty fishermen simply reiterated the arguments that the State had made before the federal court. Moreover, as the State's Petition in No. 77-983 quite clearly shows, the State, the party which "lost" below, seeks not a reversal but an affirmance.[47] Lacking "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process," *United States v. Johnson*, 319 U.S. 302, 305 (1943), these cases do not meet the constitutional requisites of justiciability.

In *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977), the action initially was dismissed as moot by the Supreme Court of Washington, 87 Wn.2d 417, 553 P.2d

46. In the proceedings the State admitted that it could not fairly present the arguments supporting the federal court decisions, and that these arguments were best made by the tribes and the United States, none of which were parties. As to the legal sufficiency of these arguments, the State left no doubt as to its position:

> And, of course, it must be clearly understood that Fisheries and the undersigned counsel do not believe these arguments to be correct in the law.

See Respondent's Brief to the Washington State Supreme Court, in *Puget Sound Gillnetters Ass'n v. Moos*, Cause No. 45144 and 44401 at 3, 5.

47. Where, as here, "both litigants desire precisely the same result there is no case of controversy within the meaning of Article III." C. Wright, Law of Federal Courts §13, at 40 (3rd ed. 1976), citing *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971). *See also, Chicago v. Grand Trunk Ry.*, 143 U.S. 339, 343 (1882) (Brewer, J.) (on the risk of courts acting upon an agreed statement of facts); *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850) (Taney, C.J.).

113 (1976), only to be revived when the State's attorney stressed that perpetuation of the "conflict" between state and federal decisions would enhance the prospects for Supreme Court review. 89 Wn.2d at 277, 571 P.2d 1374; *see also* 87 Wn.2d at 421, 553 P.2d at 116. The cases remain moot; the 1974 salmon fishing season is not only long since past, but the conflict will never arise in the same form again since the District Court orders are now framed on the assumption that the State Department of Fisheries will be unable to regulate other than for conservation purposes.

In sum, the State cases are literally saturated with fundamental defects and grossly inappropriate for appellate review.

Second, setting aside the contrived nature of the State cases, it is clear that no direct conflict between the State Supreme Court and the United States District Court has occurred. The District Court, in its August 31, 1977 order, removed the treaty allocation from State jurisdiction. The Court left the State only with its asserted power over conservation matters, and the State is no longer required to allocate between treaty and non-treaty fishermen. Since the State now exercises no control over the treaty allocation except for conservation, the State Supreme Court's interpretation of the treaties has become irrelevant.

Finally, the Petitions in 78-983 and 78-139 have obscured the fact that Supreme Court review cannot cure the underlying enforcement problems created by the State's asserted[48] state law incapacity to allocate between

48. We, of course, do not agree that state law blocks treaty rights guaranteed under the Supremacy Clause. As Justice Utter observed in his dissenting opinion in *Tollefson:*

> It cannot seriously be argued that the Director of Fisheries lacks

different fishermen. Regardless of the adjudicated meaning of the treaties, the State court presumably will continue to hold that the Department of Fisheries cannot enforce them consistent with State law. Fundamentally, the enforcement problems that do exist are founded on this state law deficiency and not upon any "conflict" in treaty interpretation.

B. Lower Federal Court Decisions Do Not Conflict With Prior Decisions Of This Court

The State of Washington assert that the lower federal court orders in *United States v. Washington* are in conflict with the treaty fishing decisions of this Court because the State's authority to regulate treaty fishing when necessary for conservation has been diluted by orders of the District Court. Nothing could be further from the truth. The District Court in its initial decision[49] and in subsequent orders implementing the decision,[50] recognized that the State may regulate treaty fishing when reasonable and necessary for conservation. The court's resolve to follow the mandate of this Court as stated in *Puyallup I & II* was clearly stated:

> In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge,

power to allocate fish between distinct and competing user groups for purposes of conservation and systematic exploitation of the resource. Such allocation has been the principal effect of Department regulation for many years.

89 Wn.2d at 288, 571 P.2d at 1380.

49. ¶19, Injunction, March 22, 1974, 384 F. Supp. at 417.

50. Preliminary Injunction Order (State Appellant's Appendix, 93, 98.)

> despite academic or personal misgivings, to enforce and apply every principal of law as it is directly stated in a decision of the United States Supreme Court. Recently the United States Supreme Court in *Puyallup-I* and *Puyallup-II* directly and specifically held that Washington has the power to regulate off reservation treaty right fishing in the particulars and to the extent indicated in those decisions, which holding continues in effect unless and until overruled or modified by that court or by Congress. Accordingly, each of the rulings on specific issues in this case stated in Section IV of this decision has been considered and determined on that basis.

United States v. Washington, 384 F. Supp. 312 at 339.[51]

The State attempts by a twisted reading of the District Court's August 31, 1978 Memorandum Order and Preliminary Injunction to suggest that the Court's firm resolve of 1974 has weakened. (State Pet. Cert. at 25.) The August 31 Order *affirms* that the State may regulate when necessary for conservation, and specific procedures are established for such regulation. These procedures would be meaningless if the regulatory power of the State had been removed.[52]

Next the State argues that the District Court's approval of separate fishing times for treaty fishermen somehow discriminates against non-treaty fishermen and contravenes decisions of this Court. (State Pet. Cert. at 24-25) A similar argument was rejected by this Court in *Winans*

51. Both Petitioners quote the District Court's criticism of the *Puyallup* decisions, 384 F. Supp. at 337-338, but fail to point out that the Court specifically held that it was bound by those holdings. (State Pet. Cert. at 25, n. 10; Gillnetters Pet. Cert. at 29-30.)

52. The Court found that the State had utilized its regulatory power in a way that discriminated against treaty fishermen. The prior approval referred to by the Court, State Pet. Cert. at 59, was designed to check abuse. That there was no intention of modifying the original decision is made clear in the District Court's October 17, 1977 Preliminary Injunction Order where the State's authority to close was expressly stated. State Pet. Cert. A-93, 98.

in 1905.[53] It is well established that Indians need not comply with various state laws binding on other fishermen such as licensing requirements, *Tulee v. Washington*, 315 U.S. 681 (1942), nor need they comply with state gear limitations not shown to be necessary for conservation. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973).

Moreover in *Puyallup III* the Court approved the portion of the lower court order which immunized the treaty fishermen, absent conservation considerations, from state control as to "time, place or method of fishing" up to the amount of the tribal allocation. *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 177-178, n. 18. As the Court of Appeals recognized, in order to allow fish to reach the tribal terminal areas, it is necessary to limit the non-treaty fishery further up the migration path and provide for separate fishing times for treaty fishermen. *Puget Sound Gillnetters v. District Court*, 573 F.2d at 1130.

Finally, the State argues that the District Court's inclusion of hatchery fish in the treaty allocation conflicts with prior decisions of this Court. (State Pet. Cert. at 25-26). First, the State is premature. The District Court reserved ruling on the inclusion or exclusion of hatchery fish, and the issue is therefore not properly before this Court.[54]

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53. In *Winans* this Court was asked to deny the special nature of treaty rights, allow the State the general authority to regulate treaty fishing and provide in treaty fishermen no greater rights than those enjoyed by non-treaty fishermen. To this challenge the Court responded:

> This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.

United States v. Winans, 198 U.S. 371, 380 (1905).

54. The Court's preliminary decision on hatchery fish was entered on August 13, 1976 and was not appealed by the State. Menorandum Decision Granting Preliminary Injunction. At the present time the parties are completing discovery prior to trial of the hatchery issue.

Secondly, this Court has *never* ruled as a matter of law on the hatchery fish question. What this Court *has* said is that hatchery fish may be a factor to be considered in making an allocation. *See Department of Game v. Puyallup Tribe*, 414 U.S. 44, 48-49. In *Puyallup III*, the propriety of the allocation made below was not raised and this Court specifically declined to decide the hatchery issue. 433 U.S. at 177, n. 17. The District Court should be given the opportunity to determine this question before it is appealed.

On the other hand the decisions of the Washington Supreme Court *do* directly contravene *Winans, Tulee* and *Puyallup I, II,* and *III*. *See* the dissenting opinion of Justice Utter of *Washington State Commercial Passenger Fishing Vessels Ass'n v. Tollefson*, 89 Wn.2d 287, 571 P.2d 1379.

C. The District Court Has Not Departed From Accepted And Usual Judicial Proceedings In This Matter

The State and non-treaty fishing groups argue that the District Court has adopted "extraordinary measures" in implementing its decision. (State Pet. Cert. at 26, Gillnetters Pet. Cert. at 32-34). More careful analysis makes it evident that the decisions below present only unimpeachable examples of the power of a federal court to enforce prior decrees. These were resolved correctly and do not support review.

1. *The District Court Did Not Abuse Its Discretion In Fashioning Implementing Orders To Protect Its Prior Decree*

In response to the State's argument that the allocation and management orders were unlawful, the Ninth Circuit upheld the discretionary actions of the District Court, observing:

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees . . . The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offer the court no reasonable choice.

Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

> The circumstances compelled the court to intervene in fisheries management, and the state does not appear to quarrel seriously with the specific allocations. Indeed, we do not see how, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner.

Id. at 1130 (footnote ommitted).

It is beyond reasonable debate that a federal equity court has broad discretion to fashion remedies to correct the systematic invasion of federally-protected rights. *See e.g., Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). "In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation," *Hutto v. Finney*, ... U.S. ...., 98 S. Ct. 2565, 2572 (1978), particularly where, as here, the State has not complied with prior mandates. Remedial orders, to be sure, should be responsive to the nature and scope of the encroachment upon the federally-protected rights, fashioned to correct the wrong inflicted, and sensitive to the interests of state authorities to manage their own affairs consistently with the constitution. *Milliken v. Bradley, supra*, at 280-281 (1977). But the choices of trial courts, reflecting a more intimate understanding at the

degree of wrong and the pattern of non-compliance, are accorded great weight by appellate courts. *See e.g., Mills v. Gautreaux*, 425 U.S. 284, 297-98 (1976).

So tested, the District Court orders affirmed by the Ninth Circuit easily pass muster.[55]

The State's allegation that the District Court has "taken control" of fisheries management in the August 31, 1977 Allocation Order (State Pet. Cert., p. 28) neglects to point out that the Court asserted authority only to the extent the State disavowed it in its campaign to defeat prior orders.[56]

The characterization of the August 31 order as an "allocation" not contemplated by the 1974 decision (State Pet. Cert. at 14-16) is disingenuous. In the 1975 appeals to the Ninth Circuit, the State inself urged that an "appropriate" allocation for salmon was one-third (sports), one-third (non-treaty commercial), and one-third (treaty).[57]

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55. In the face of steadfast non-compliance, the Memorandum Order and Preliminary Injunction of August 31, 1977 (the Allocation Order) is admirably constrained. It was designed to protect the fishing opportunity as defined in the original decision and to rectify the consequence of State non-compliance upon tribal fishing opportunities. It addressed, with great care, the root of the problem: State inability to manage the fishery consistent with federal law. The Court of Appeals recognized that the Allocation Order represented the least intrusive remedy available, short of abandoning enforcement altogether. *Puget Sound Gillnetters v. United States District Court*, 573 F.2d at 1130 (9th Cir. 1978).

56. As noted above, the major management decisions relating to run size, escapement needs, and management periods continue to be made by the State.

57. Brief of Appellants Dep't. of Fisheries and State of Washington, Nos. 77-2439, 74-2440, 9th Cir., Sept. 11, 1974, p. 49, *see also*, pp. 50-52. The Washington Supreme Court, ironically, has approved an "allocation," *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), and this action was upheld by this Court. *Puyallup Tribe, Inc. v. Department of Game* (Puyallup III), 433 U.S. 165 (1977).

2. *Non-parties Who Engage In Admitted, Widespread And Deliberate Attempts To Frustrate Prior Orders Protecting Federally-Reserved Fishing Rights May Be Included Within The Scope Of The District Court's Enforcement Orders*

Petitioners argue that injunctive action by a district court against persons not party to the case is so serious as to merit review by this Court. (State Pet. Cert. at 26, Gillnetters Pet. Cert. in 77-119 at 4.) However, the District Court's enforcement orders against violations by the non-treaty fishermen were undertaken at invitation of the State,[58] with extreme procedural care,[59] and against a backdrop of lawlessness rarely confronted.[60] The Ninth Circuit Court of Appeals sustained the non-party features of the District Court's orders on the ground that the fishermen "are bound because they are in privity with the state, which

58. See note 29 and accompanying text, *supra*.

59. The Gillnetters' attempt to manufacture a notice issue in its petition (Pet. Cert. at 4-5, 9) is spurious. Counsel for the non-treaty groups have been on the service list and have participated as *amici* in the implementation phases of the decision for several years. All of the temporary orders, which of course are not reviewable here, were served with supporting documents in the ordinary course upon attorneys for the non-treaty groups. The Preliminary Injunction of September 27 was preceded by two hearings (one, on September 22, before the Magistrate, another, on September 27, before the court), both with full notice and opportunity to be heard. The September 27 order provides for personal service on all licensed fishermen, sets up a "hot line" telephone service to communicate information on open and closed areas, and makes clear that citations are to be issued only to fishermen with actual notice. (Gillnetters' Pet. Cert., App. H) Obviously, individual claims of inadequate notice, if any there be, can be litigated in individual contempt proceedings not before this Court. *See United States v. Olander, et al., supra.*

The further suggestion (Gillnetters' Pet. Cert. at 10) that the non-treaty groups have been unfairly excluded from proceedings before the District Court is unwarranted. One of the groups, the Washington Reef Net Owners Association, has been a party throughout. Another, the Puget Sound Gillnetters Association, has never requested intervention. A third, the Purse Seine Vessel Owners Association, was denied intervention shortly after the initial decision in 1974, and did not pursue an appeal. At argument before the Ninth Circuit, counsel for the Gillnetters made it clear that they had not intervened for fear that they might be held bound.

60. *Puget Sound Gillnetters Ass'n. v. United States District Court*, 573 F.2d at 1126.

is a party," without ruling on other theories supporting the same result (573 F.2d at 1132, State Pet. Cert. A-18).

The adjudications of the State's *parens patriae* interest in the fisheries resource are, quite clearly, binding upon the citizens of the state, *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958), a proposition illustrated by a series of water rights cases. *Arizona v. California*, 373 U.S. 546 (1963), decree entered, 376 U.S. 340 (1964); *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935); *Wyoming v. Colorado*, 286 U.S. 494, 506-09 (1932); *see New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (per curiam).[61] The interests of the State and the non-treaty fishermen are identical, and there is no doubt the latter would have benefitted if the initial decision had gone against the tribes. *See Blonder-Tongue Labs, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

D. "International Fisheries" Case

The IPSFC issues raised by the State (State Pet. Cert. at 5, 28-35) are moot and are otherwise insubstantial for all the reasons set out by the United States in its Memorandum at 16-18 and 25-27.

61. Additionally, alternative grounds supporting the judgment below are set forth in detail in the United States Response to the Writs of Prohibition or Mandamus before the Ninth Circuit, Cause Nos. 77-3129, 77-3208, 77-3209. Briefly, the District Court's orders against the non-treaty fishermen are also sustainable on the grounds that the court was protecting its jurisdiction over the subject matter of the controversy, that the non-treaty fishermen were acting in "active concert or participation" with state officials party to the adjudication, Fed. R. Civ. P. 65(d), or as obstructors of state and federal officials attempting to comply with the original and subsequent implementing decrees. *See e.g., Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973); *Bullock v. United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972); *Kasper v. Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *United States v. Dean Rubber Mfg. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946).

E. Additional Allegations By The State Of Washington And By Petitioners In No. 77-139 Do Not Merit Review

Both the State of Washington and the non-treaty fishing groups have mentioned several other purported reasons for granting review of this case. From this unfocussed spectrum of assertions, we will comment briefly on two.

1. *Equal Protection.* The State claims that the allocation orders constitute violations of the constitutional guarantee of equal protection and the prohibition against granting special privileges and immunities. State Pet. Cert. at 5. This contention is unsupported by argument and frivolous. This warmed-over version of the argument that the "in common with" language of the treaties reserved to the tribes no different fishing rights than those enjoyed by other citizens was flatly rejected more than 70 years ago in *United States v. Winans,* 198 U.S. 371, 380 (1905). *See also Tulee v. Washington,* 315 U.S. 681 (1942); *Antoine v. Washington,* 420 U.S. 194, 206 (1975).[62]

2. *The Federal Court's Decision is not Endangering the Resource nor an Industry.* The non-treaty fishing groups baldly assert that the federal court decisions in this matter are "destroying an industry and a resource". Gillnetters' Pet. Cert. at 24. There is no support for this contention in the record nor in fact. This and other unfounded assertions are sprinkled throughout the petition of the non-treaty fishing groups. Unfortunately, the representations and assertions of the non-treaty fishing groups and their counsel are simply not credible.[63]

62. And, of course, the equal protection argument has been specifically rejected by the Court on at least three occasions even where treaty guarantees are not involved but the recognition of Indian rights is based on the special relationship of the United States with Indian people. *United States v. Antelope,* 430 U.S. 641 (1977); *Fisher v. District Court,* 424 U.S. 383, 391 (1976) (*per curiam*); *Morton v. Mancari,* 417 U.S. 535, 551-55 (1974). *See also Forge v. Minnesota,* 262 N.W.2d 341 (Minn. 1977), *appeal dismissed for want of a substantial federal question,* .. U.S. .., 55 L. Ed. 2d 512 (1978).

63. In *United States v. Olander, supra,* in upholding the contempt convictions of six non-treaty fishermen, the Ninth Circuit Court of Appeals characterized their arguments and the arguments of their counsel as ". . . too far fetched to warrant serious consideration." Slip Opinion at 6; bordering ". . . on the frivolous" (*id.*.; ". . . a bit of pettifoggery." (*id.*); ". . . fallacious" (*id.* at 7); ". . . so obviously lacking in merit as not to warrant further consideration." (*id.* at 9); ". . . somewhat offensive." (*id.* at 12); ". . . plainly insufficient." (*id.* at 17); ". . . frivolous." (*id.*); ". . . monkey business." (*id.* at 20); ". . . patently without merit" (*id.* at 21); and ". . . nonsense." (*id.* at 22). Additionally, the Court of Appeals noted that "[a]pparently, counsel does not hesitate to have his clients swear to things he does not and cannot know." (*id.* at 20).

F. Review Of The Treaty Interpretation And Of Other Issues Is Barred By The Doctrine Of Res Judicata

These petitions are bald attempts to relitigate matters put to rest in *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976), and ought to be denied. The State of Washington has litigated and lost the issues of the meaning of the "in common with" language of the treaties, the scope of the treaty entitlement to fish, the necessity for an allocation and its content, the reach of tribal jurisdiction, and the state power to regulate for conservation purposes, all of which are sought to be reargued again in the undisciplined petitions filed here. State Pet. Cert. 4-5, Questions Presented 1, 2, 3, 4, 7; Gillnetters' Pet. Cert. 4-5, Issues 1, 3, 5.

In our view, review of these issues at this point so directly contravenes established principles of *res judicata* that in order to grant review the Court would need to reexamine its decisions concerning *res judicata* as well.

In *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948), the Court described the policies which underlie the doctrine of *res judicata* as follows:

The general rule of *res judicata* . . . rests upon con-

> siderations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment of the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'. *Cromwell v. County of Sac,* 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatsoever, absent fraud or some other factor invalidating the judgment.

333 U.S. at 597.

The United States argues that *res judicata* is not a bar to review of these already-litigated issues citing *Mercer v. Theriot,* 377 U.S. 152 (1964) and *Reece v. Georgia,* 350 U.S. 85 (1955). United States Memorandum at 22, n. 16. These cases are not persuasive with respect to the present reviewability of the District Court's 1974 decision, however, because none of them involved final judgments. In *Mercer v. Theriot,* although certiorari had been denied upon an earlier appeal, the decision did not become final for purposes of *res judicata* since the Court of Appeals had originally remanded the case to the District Court for further proceedings and a possible new trial. 377 U.S. at 153. The original cause of action was still alive, therefore, when this Court later granted review. Similarly, in *Reece v. Georgia,* the Supreme Court of Georgia had originally remanded the case for a new trial after reversing appellant's conviction. 350 U.S. at 86-87. The case was not "final". *See also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251 (1916) where this Court in allowing reopening of issues in a similar context, specifically referred to the original order

for which certiorari was denied as "not a final one" and "interlocutory." 240 U.S. at 258.

In contrast, the District Court's 1974 decision became final upon the original 1976 denial of certiorari since the Court of Appeals affirmed the decision in full. A remand was ordered, but only for the exercise of the Court's continuing jurisdiction. The declaratory judgment phase of the case was completed.

With respect to the United States' recommendation, we fail to understand how the United States has been persuaded to acquiesce in the principle that a state by steadfast resistance to the implementation of federal rights earns the privilege of reopening previously litigated issues before the Supreme Court. The United States' position suggests to us that it believes that there is a certain threshhold level of illegality, which, when exceeded, justifies modification of ordinary principles of judicial finality. The United States' position is particularly troubling in light of its forthright and manifestly correct assertion that the State courts improperly refused to give *res judicata* effect to the judgment of the federal courts. *See* United States Memorandum at 23-24. Surely it is inconsistent in principle for the United States to take the position that this Court should likewise ignore the principle of *res judicata.*

This Court should refuse this invitation to sanction such massive State resistance to federal rights. To adopt the United States, argument simply invites collateral attack[64] on valid judgments by recalcitrant parties.[65]

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64. Judicial review at this stage is also contrary in principle to the familiar collateral bar rule which restricts severely opportunities to challenge the underlying court order by those who choose to violate it first. *Walker v. City of Birmingham,* 388 U.S. 307 (1967); *see Maness v. Meyers,* 419 U.S. 499, 459 (1975).

65. Neither the United States nor the Petitioners have discussed what impact review of the decisions will have on Oregon and its citizens. As noted above, Oregon has complied with and enforced the Oregon decisions. Clearly, to capitulate to Washington's lawlessness will completely

V.
CONCLUSION

None of the points in the Petitions for Writs of Certiorari merit granting the writs. In its Memorandum, the United States agrees that there is no substance to any of the arguments raised by Petitioners and that the State Supreme Court decisions are violative of *res judicata*, unprincipled, and unsuitable vehicles for review because of the absence of any factual record. Nevertheless, the United States supports review. In so doing, it appears to rely on the following assertions and reasoning:

> (1) Because of the State refusal to comply with the decision, a breakdown in enforcement has occurred with the result that the resource is endangered.
>
> (2) The State has been removed from its usual management functions and the District Court has been forced to assume major responsibility for managing the resource.
>
> (3) The United States has been forced to concentrate a disproportionate amount of enforcement effort on the Washington fisheries with the result that United States resources have been diverted from other (evidently more important) "regular duties".

Only Supreme Court review, opines the United States, will solve all these "problems". *See* United States Memorandum at 19-21.

These largely political arguments are pale justifications for review.

As noted in the Statement of the Case, *supra*, not only has the United States exaggerated the extent of the enforcement problems, but, with the recent affirmance of the contempt convictions by the Court of Appeals, enforcement should become considerably easier and more effective.

unsettle what is now a relatively stable situation. In the event of review, at least one of the parties to the Oregon litigation believes that Oregon will be forced to attempt to collaterally attack the decision here. *See* "Brief of Respondent, Yakima Nation, in Opposition" in Cause No. 78-139 at 10. Neither Petitioners nor the United States have set forth any reasons sufficient to justify imposition of these consequences on a state which has honored declared federal rights.

As to the management problems, the State still performs its technical management functions such as monitoring the runs and retains its jurisdiction to conserve the resource even as against Indian treaty fishing. The District Court has *not* taken over the day-to-day management of the runs but has only established mechanisms to resolve technical disputes when they arise. The State and tribal biologists still have primary responsibility to manage the resource.

As to the last point, it is the responsibility of the United States to enforce the treaties no less than other domestic federal law. Until now we were unaware that enforcement of rights guaranteed under the supremacy clause were not "regular duties" of federal personnel.

In the absence of any legitimate legal issues deserving review, certiorari should be denied. However, if certiorari is granted, we suggest that summary reversal of the State Supreme Court cases and summary affirmance of the Court of Appeals decisions would be appropriate because of the lack of any legitimate controversy.

Respectfully submitted this 27th day of September, 1978.

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